Supreme Court of the United States

OCTOBER TERM, 1967

No. 71

JAMES P. CARAFAS,

Petitioner,

against

HON. J. EDWIN LA VALLÉE, Warden of Auburn Prison, Auburn, New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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Opinions Below

The Court of Appeals wrote no opinions in dismissing the appeal and in denying rehearing. The opinion of the District Court is not reported. It is set forth in the Appendix (A. 49-56).*

Jurisdiction

The order of the Court of Appeals is dated February 3, 1967 (A. 77). The order denying rehearing is dated February 21, 1967 (A. 74). The petition for certiorari was filed on March 20, 1967. Certiorari was granted on Octobe 16, 1967. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. Section 1257(3).

* Numbers in parentheses preceded by the letter "A" refer to pages in the Appendix.

Constitutional and Statutory Provisions Involved

United States Constitution, amends. IV, XIV (Petitioner's appendix, pp. 23-25). United States Code, Title 28, Section 2241:

> "(c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> • • •
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ."

Questions Presented

1. Is the instant case moot by virtue of the fact that petitioner has completed service of his sentence and has been discharged unconditionally from custody (*Parker* v. *Ellis*, 362 U. S. 574)?

2. Was petitioner the victim of an unreasonable search and seizure when there was ample probable cause to arrest him and any search was incident to the arrest?

3. Does the exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643, apply on habeas corpus to petitioner's trial, held prior to the date of that decision?

4. Was petitioner wrongfully denied a full appeal by the Court of Appeals?

Statement of the Case

Petitioner and his wife were convicted after a jury trial in the County Court, Nassau County, of the crimes of burglary in the third degree and grand larceny in the second degree, in connection with the theft of furniture

from a model home in Oceanside, Long Island. Petitioner was sentenced, on October 22, 1960, to concurrent terms of from three to five years in prison and has fully served those sentences.

On direct appeal following the decision of this Court in *Mapp* v. *Ohio*, 367 U. S. 643, it was claimed that photographs of the stolen furniture, introduced at trial, were the fruits of an unlawful search and seizure and should have been excluded from evidence at the pre-*Mapp* trial. The judgments of conviction of both defendants were unanimously affirmed without opinion by the Appellate Division, Second Department (*People* v. *Carafas*, 14 A. D. 2d 886, 218 N.Y.S. 2d 536) on November 6, 1961 and by the New York Court of Appeals. 11 N. Y. 2d 891, 182 N. E. 2d 413. On May 10, 1962, the Court of Appeals amended its remittitur to reflect that it had held that the appellants' constitutional rights had not been violated. 11 N. Y. 2d 969, 183 N. E. 2d 697. Certiorari was denied by this Court. *Carafas* v. *New York*, 372 U. S. 948.

Petitioner then sought federal habeas corpus relief (A. 4-24). The application was denied by the United States District Court for the Northern District of New York (FOLEY, J.), on the ground that petitioner admittedly had failed to object at trial to the introduction of the challenged evidence (A. 30-32). The decision was reversed by the Court of Appeals for the Second Circuit. The Court held that the *Mapp* rule was applicable to state convictions which were still in the appellate process on the date of that decision, that petitioner was not required to object to the introduction of evidence at a time when he had no right to its exclusion and that, in any event, the Court of Appeals had passed on the merits of the search and seizure claim. Accordingly, the case was remanded to the District Court for consideration on the merits (A. 44-48). *United States ex rel. Carafas* v. *LaVallee*, 334 F. 2d 331. Certiorari was denied by this Court. *LaVallee* v. *Carafas*, 381 U. S. 951.

An evidentiary hearing was ordered by the District Court and was held on November 5, 1965. In addition to the testimony adduced at the hearing, the Court considered the trial record and the transcript of a hearing held in the Nassau County Court in August and September, 1962 on a motion by petitioner to suppress evidence related to an indictment for a different burglary. Judge FOLEY, after having had the opportunity to assess the credibility of petitioner, his wife, and Detectives Grim and Kapler, accepted as true the testimony of the detectives (A. 53-54). He held that the entry and arrest were lawful and that the subsequent seizure was incident to that arrest (A. 55). By order dated May 2, 1966, the Court held the search and seizure lawful but granted a certificate of probable cause (A. 49-56).

Thereafter, petitioner, who had been represented by retained counsel in the District Court, applied *pro se* to the Court of Appeals for the Second Circuit for leave to appeal *in forma pauperis*. He did not request the assignment of counsel (A. 59-64).

In accordance with the established practice in the Court of Appeals, respondent opposed the granting of *forma pauperis* relief and moved to dismiss the appeal for want of merit (A. 65-69). The motion was considered on papers, including all the relevant minutes and the briefs which were submitted to the District Court by counsel for both parties following the evidentiary hearing. On February 3, 1967, the Court of Appeals denied the application for leave to appeal *in forma pauperis* and granted the motion to dismiss the appeal (A. 77). A petition for rehearing, submitted by retained counsel, was denied on February 21, 1967 (A. 74).

On March 6, 1967, petitioner's term expired and he was discharged outright from his parole status. The petition for certiorari was filed on March 20, 1967 and certiorari was granted on October 16, 1967.

Summary of Argument

Petitioner was unconditionally released from custody on March 6, 1967, two weeks prior to the filing of his petition for a writ of certiorari. Accordingly, this proceeding is moot. *Jones* v. *Cunningham,* 372 U. S. 236; *Parker* v. *Ellis,* 362 U. S. 574. Those cases should be followed since the habeas corpus statute requires that a petitioner be in custody (28 U.S.C. §§ 2241-2254), and since Congress has amended the habeas corpus statute without altering the jurisdictional prerequisite of custody. The only relief authorized under the habeas corpus statute is discharge from custody and this Court has so held. *McNally* v. *Hill,* 293 U. S. 131. The relief authorized by way of habeas corpus is the same relief authorized by way of 28 U.S.C. § 2255 with respect to federal prisoners. Finally, there are no special circumstances in this case which would mandate a departure from the well-established rule.

The search of petitioner's apartment complied with Fourth Amendment standards for searches and seizures. At the time police went to petitioner's house they knew that a burglary had been committed, they had a description of some of the missing items, and they had interviewed a tow truck operator who told them he had pulled petitioner out of the sand near the scene of the crime that morning. The police entered the house through unlocked doors and went into a public hallway. Learning that petitioner lived upstairs, they started upstairs to an area which petitioner himself described as "a public hallway". They saw petitioner and a piece of furniture matching the description they had received. At that point, while still in a public area, they arrested petitioner and his wife. The subsequent entry into the apartment was reasonable since the apartment was immediately adjacent to the area where the arrests were made and since the arresting officers were in pursuit of petitioner and his wife who strenuously

resisted arrest. Indeed all of the items seen by the officers in the apartment were seen only as the result of this resistance. This case is, in fact, a "hot pursuit" case.

Even if this case does not meet strict Fourth Amendment standards, it does comply with standards of fundamental fairness. The arrest and trial in this case took place prior to *Mapp* v. *Ohio*, 367 U. S. 643. Thus under the operative law at the time, the police were not aware that any warrant might be required. The police did not act unreasonably or abusively and therefore this case is inappropriate for relief by way of habeas corpus. *Stovall* v. *Denno*, 388 U. S. 293; *Fay* v. *Noia*, 372 U. S. 391.

In any event, petitioner should not be entitled to invoke the exclusionary rule of *Mapp* v. *Ohio, supra*, in this federal habeas corpus proceeding, since his trial commenced prior to the date of that decision. *Johnson* v. *New Jersey*, 384 U. S. 719.

The case of *Nowakowski* v. *Maroney*, 386 U. S. 542, should not be interpreted as prohibiting a Circuit Court from granting a motion to dismiss a habeas corpus appeal as being without merit. The Court of Appeals in this case had before it the entire District Court record including all relevant transcripts and memoranda of law filed by counsel for both sides in the District Court. No plenary argument was required since the record revealed that the case was frivolous.

POINT I

The case is moot since the petitioner has completed service of the full term of the state court judgment of conviction now being challenged and is not presently detained in the custody of the respondent Warden or any other state official.

The petitioner was unconditionally released from state custody, on March 6, 1967, two weeks prior to the filing of his petition for a writ of certiorari. He is not now detained or restrained of his liberty by the respondent or, indeed, by any other official of the State of New York. Accordingly, this proceeding, which seeks review of the denial of his application for a writ of habeas corpus, is moot. *Parker* v. *Ellis*, 362 U. S. 574. In the event the Court is prepared to reconsider *Parker* v. *Ellis* and extend habeas corpus to cases not involving custody or detention, respondent submits that such an extension would seriously alter the meaning and function of federal habeas corpus review of state criminal convictions. The federal courts would then be burdened with a type of case over which Congress has given them no jurisdiction and which, in the absence of any showing of special circumstances, raises issues which are academic to the parties.

The habeas corpus jurisdiction of the federal courts has been defined by Congress in unequivocal terms. No federal court has the power even to consider an application for a writ of habeas corpus unless the applicant is in custody (or must be brought into court to testify or for trial). 28 U.S.C. § 2241(c). With respect to challenges to state activities, the writ "shall not extend to a prisoner unless . . . He is in custody in violation of the Constitution or laws or treaties of the United States . . ." 28 U.S.C. § 2241(c)(3).

The jurisdictional assumption of § 2241 could hardly be more straightforward and is repeated in other sections of the habeas corpus chapter. Thus, an application for a writ

of habeas corpus "shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority . . .". 28 U.S.C. § 2242. See also, Rule 31(5), Revised Rules of the Supreme Court (1967), which requires all applications for original writs of habeas corpus in the Supreme Court to comply with the requirements of 28 U.S.C. § 2242. Similarly, the person to whom a writ is directed "shall make a return certifying the true cause of the detention." 28 U.S.C. § 2243. Moreover, 28 U.S.C. § 2244, dealing with successive applications for writs, speaks in terms of inquiring into the validity of the applicant's detention, as does 28 U.S.C. § 2245. Finally, 28 U.S.C. § 2254, dealing with exhaustion of state remedies by state prisoners, clearly envisions applications by state prisoners "in custody pursuant to the judgment of a State court" and 28 U.S.C. § 2253, dealing with appeals, requires a certificate of probable cause "where the detention complained of arises out of process issued by a state court."*

In 1966, Congress amended the habeas corpus statute (28 U.S.C. §§ 2241, 2244, 2254) and continued the jurisdictional prerequisite of custody or detention. It should therefore be assumed that Congress approved the holding of *Parker* v. *Ellis* defining the scope of federal habeas corpus jurisdiction. *Electric Battery Co.* v. *Shimadzu*, 307 U. S. 5; Sutherland, Statutory Construction (3d Edition), Sec. 1933. See also U. S. Code Cong. and Admin. News, 1966, Vol. 2, pp. 2968-2978, Vol. 3, pp. 3663-3666. Similarly, Congress must be deemed to have approved this Court's holding that the "purpose of the proceeding defined by the stat-

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* In addition, it has been observed that the purpose of Rule 49 of this Court respecting custody during habeas corpus proceedings is in part "to protect the jurisdiction of the reviewing courts (including the Supreme Court) by obliging respondents to retain custody of habeas corpus petitioners pending review . . ." Boskey and Gressman, "The 1967 Changes in The Supreme Court Rules", 42 F.R.D. 139, 160 (1967).

ute . . . was to inquire into the legality of the detention and the only judicial relief authorized was the discharge of the prisoner or his admission to bail." *McNally* v. *Hill*, 293 U. S. 131, 136. Thus, the authority granted by 28 U.S.C. § 2243 to "dispose of the matter as law and justice require" can refer only to the power of Court to which an application for a writ is made to issue any order it considers appropriate respecting the custody of the prisoner. Moreover, as the other sections of the statute make clear, "law" requires that habeas corpus jurisdiction be limited to inquiring into the custody or detention of a prisoner. As the Court unanimously held in affirming the dismissal of a writ solely because the petitioner was not deprived of his personal liberty:

> "All these provisions contemplate a proceeding against some person who has the immediate custody of the party detained; with the power to produce the body of such party before the court or judge, that he may be liberated if no sufficient reason is shown to the contrary." *Wales* v. *Whitney*, 114 U. S. 564 at p. 574.

See also, *Eagles* v. *Samuels*, 329 U. S. 304, 306-307, in which Mr. Justice DOUGLAS, speaking for a unanimous Court, recognized that where, as here, the applicant for habeas corpus is released from custody subsequent to the denial of his application for a writ below, the case would be rendered moot in this Court.

Under these circumstances, the decision of the Court in *Parker* v. *Ellis* is clearly correct. Indeed, this decision was reaffirmed in *Jones* v. *Cunningham*, 372 U. S. 236, where the Court unanimously held that an application for a writ of habeas corpus directed at a Warden of a state institution became moot when the Warden's custody came to an end. The only difference between that case and the case at bar is that there the petitioner was in effect transferred to the custody of someone else when his case against the Warden became moot so that there was sufficient state

custody to support habeas corpus jurisdiction. Here, however, the petitioner has been unconditionally and completely discharged from any state custody or detention whatsoever.

The statutory jurisdictional mandate applies also to federal post-conviction review of federal convictions. 28 U.S.C. § 2255. The substantive remedy provided by this statute is identical with that of habeas corpus, *United States* v. *Hayman*, 342 U. S. 205, and by its own terms applies only to a person in custody. In interpreting that statute a majority of the Court has recognized that the "very office of the Great Writ, its only function, is to inquire into the legality of the detention of one in custody." *United States* v. *Heflin*, 358 U. S. 415 at p. 421. Thus, an application to set aside a federal conviction where the sentence had already been served in full could not be treated as an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2255, but only as an application in the nature of a common law writ of error coram nobis. *United States* v. *Morgan*, 346 U. S. 502.

By a parity of reasoning, only if the Court is prepared to conclude that federal courts have inherent coram nobis power over state court judgments of conviction can the instant case now be considered to present a question within the jurisdiction of the federal courts. There is no basis for such a pervasive view of the powers of the federal courts on collateral attack of state judgments of conviction, especially in view of the Court's holdings that even direct appeals from state courts are moot if the defendant has fully served his sentence, as here, by the time the case reaches this Court. *Jacobs* v. *New York*, 388 U. S. 431; *Tannenbaum* v. *New York*, 388 U. S. 439. Nor do we believe that this Court, in the absence of a mandate from Congress, should consider that requiring district courts to entertain applications for habeas corpus challenging state court convictions in which the sentence has been fully

served would represent a sound demand on the time and energies of the district courts which already bear a heavy burden of habeas corpus applications by incarcerated state prisoners.

Even apart from statutory requirements, the instant case is an even stronger one for applying the doctrine of mootness than *Parker* v. *Ellis*. Here, far from presenting a case of "flagrant disregard of [petitioner's] constitutional right to assistance of counsel", 362 U. S. at page 577, the petitioner has presented, at best, a tenuous search and seizure claim.* More importantly, in the case at bar, there is absolutely no claim on the part of the petitioner that the judgment of conviction which he seeks to challenge is currently subjecting him to any disabilities or restrictions on his liberty, or that it threatens to do so. Accordingly, the Court is now being asked, not to release the prisoner, but to declare the invalidity of his state judgment of conviction where the petitioner does not even suggest that such a declaration would have any effect on him whatsoever. This petitioner did not suffer either from lack of counsel or from a disregard of his rights by the New York courts. During his direct appeals, including his first application for certiorari, the petitioner was on bail (A. 38-39). Thereafter, the federal courts denied petitioner's applications for bail and for a stay of his state sentence pending his original appeal to the Circuit Court (A. 41). Subsequent to the first decision by the Circuit Court, there were no further applications for bail or for a stay. Finally, this Court was twice asked to consider this case, once at the request of the

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* The apparent reason for granting certiorari was to consider the applicability of *Nowakowski* v. *Maroney*, 386 U. S. 542, to the circumstances of the case at bar. Thus, even if the Court decides that the case is not moot, if *Nowakowski* applies, the case should properly be remanded to the Circuit Court of Appeals for a plenary appeal on the merits. If the Circuit Court was correct in not granting a plenary appeal, it was because the appeal was frivolous. See *infra*, pp. 21-22.

petitioner and once at the request of the respondent, and both times declined to do so. Thus, apart from the clear meaning of the statutes, there is no showing of special circumstances which indicate a rejection of or departure from the holding of *Parker* v. *Ellis*. As the Court unanimously held in dismissing a federal case as moot in *St. Pierre* v. *United States*, 319 U. S. 41 at p. 43, "the moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review." Accordingly, in conformity with the jurisdictional requirements of the statute and the prior decisions of the Court and with a view towards preserving the traditional function of the writ of habeas corpus, we respectfully submit that the case is moot.

POINT II

The police conduct with respect to petitioner, who was tried prior to the decision of this Court in *Mapp* v. *Ohio*, 367 U. S. 643, was entirely reasonable even assuming that petitioner may claim the protection of that case.

A

The District Court correctly held that the arrest of petitioner and his wife complied with Fourth Amendment standards for lawful searches and seizures.

On the morning of June 3, 1959 Detectives Grim and Kapler of the Nassau County Police, received a report of a furniture theft from a model home in Oceanside, Long Island, and went to the location (A. 102). They were taken through the premises by a Mr. Wedgwood, who described the missing furniture and showed them the remaining pieces of the bedroom set matching the pieces taken by the burglars (A. 93, 102). They spoke to a neighbor who told them that earlier that morning she had seen a

black and gray Cadillac attached to which was a U-Haul trailer with New Hampshire plates stuck in the sand by the model house (A. 103, 225). The neighbor told them that she had seen an AAA truck assist the car from the sand, and she described the man and woman who were in the car (A. 103, 225).

The two detectives located the tow truck operator and learned that the owner of the car he had pulled out of the sand that morning was James Carafas of 35-53 30th Street, Astoria (A. 103, 125-131, 226). Arriving at that address, the detectives saw a black and gray Cadillac attached to which was a U-Haul trailer with New Hampshire license plates parked in front of the two-story house (A. 92, 238).

Petitioner complains on the one hand that this information was "scant" (Br. p. 6) and on the other that the police did not have a warrant when they went to his house. If the evidence was indeed "scant", then no valid warrant could, at that time have been obtained. But, even if a warrant could not have been obtained, clearly the next step was not to abandon but to pursue the investigation. Clearly, too, the next obvious step was to attempt to interview the owner of the Cadillac, Mr. Carafas.

The detectives arrived at about 1:30 that same afternoon, a Wednesday. As they approached the house they saw a plaque indicating that a Dr. Shapiro occupied part of the premises and that he had office hours from noon until 2 P. M. daily except Friday (A. 100-101). The front door of the house, leading to a small vestibule with mailboxes and bells, was unlocked and the second door, leading from the vestibule to the inside foyer, was opened (A. 14). The detectives went through both doors to the foyer and stopped at the open door to the doctor's waiting room to ask where petitioner lived (A. 104-105). They were told that petitioner lived upstairs (A. 105).

Detective Grim went over to the foot of the stairs and shouted "Carafas", whereupon petitioner came to the top

of the stairs and identified himself (A. 105). As the detectives looked up the stairs and began to ascend, they saw a piece of furniture on the second floor landing which they recognized as matching the description of one of the stolen pieces (A. 105). Detective Grim told petitioner that he was under arrest (A. 105, 116). Then Mrs. Carafas, who was standing by the open archway leading into the living room of the second floor apartment, was also placed under arrest (A. 105, 116).

At this point the officers knew that a felony had "in fact been committed" and had "reasonable cause for believing the person to be arrested to have committed it" (N. Y. Code Crim. Proc. § 177 [3]) under New York law which governs the legality of the arrest. *Cooper* v. *California,* 386 U. S. 58; *United States ex rel. Lupo* v. *Fay,* 332 F. 2d 1020 (2d Cir.), *cert. denied* 379 U. S. 983. In the instant case, a crime had been committed, a car belonging to petitioner and identified as having been driven by him had been at the scene of the crime, and petitioner had acknowledged his identity and apparently was in possession of at least one item which the police knew was stolen.

Petitioner insists, however, that even accepting the police version of the arrest, "[t]he detectives entered the private dwelling of the petitioner, without any permission. The moment they walked up the stairway, they were trespassing on private property" (Br. p. 7). The record, however, is clear that no entry into a private area was made by the police up to the moment of arrest. The uncontradicted evidence shows that petitioner leased the entire first floor to Dr. Shapiro (A. 218). The doctor testified that his hours were posted on a sign on the front door of the house and that on June 3, 1959, he had arrived at the house shortly before 1 P.M. and had unlocked both the outside front door and the door leading from the vestibule to the foyer in order that his patients might enter (A. 218-219).

In leasing the first floor to Dr. Shapiro for use as an office, and in permitting a sign to be posted announcing the

doctor's hours, petitioner, in effect, opened the premises to the public, at least during office hours. As this Court has most recently stated: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States*, —— U. S. ——, 36 U.S.L. Week 4080, 4081 (December 18, 1967). In entering as they did, the police followed the normal procedure which any visitor would follow under such circumstances. They entered into a common hallway downstairs, an area in which petitioner had abandoned any claim he might have to privacy. *Polk* v. *United States*, 314 F. 2d 837 (9th Cir.), *cert. denied* 375 U. S. 844; *United States* v. *St. Clair*, 240 F. Supp. 338, 340-41 (S.D.N.Y.); *cf. McDonald* v. *United States*, 335 U. S. 451.

Once entry had been gained to the downstairs, no door blocked the way upstairs. The stairway itself was a public area leading both to petitioner's apartment and to a studio apartment which usually was rented, and which had been vacated by its last tenant only a few days before (A. 189, 217). Contrary to petitioner's present claim that, in setting foot on the stairway the police were trespassing, he stated unequivocally at trial that:

> "It is a public hallway, sir; anybody can walk up the stairs." (A. 159)

Thus, the petitioner had reserved to himself only his apartment. In observing the stolen furniture on the landing, the police were neither standing in a private place (*United States* v. *Monticallos*, 349 F. 2d 80 [2d Cir.]), nor observing a private place. *Cf. McDonald* v. *United States*, *supra*. Petitioner simply had left the piece of furniture in a public place where it could be seen.

Petitioner and his wife were arrested outside their apartment (A. 105, 115, 166, 227). Immediately thereafter, the two detectives followed them into the apartment. Whether or not the entry was at the express invitation of petitioner, and there is some evidence that it was (A. 228), the entry

clearly was reasonable. The apartment was immediately adjacent to the area where the arrests were made (See, *e.g.*, *United States* v. *Rabinowitz*, 339 U. S. 56; *Harris* v. *United States*, 331 U. S. 145; *Garcia* v. *United States*, 381 F. 2d 778, 783 [9th Cir.]. *Cf. Agnello* v. *United States*, 269 U. S. 20) and immediately followed the arrests.

Thus, as the District Court held, the entry and discovery of the stolen furniture were incident to the arrest being, reasonably related to it in time, place and circumstances. As this Court has recently reaffirmed:

> "It is no answer to say that the police could have obtained a search warrant, for '[t]he relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable' *United States* v. *Rabinowitz*, 339 U. S. 56, 66." *Cooper* v. *California*, 386 U. S. 58, 62.

Petitioner characterizes the events following the announcement of the arrest as "a violent struggle to deter . . . [a] search" (Br. p. 8). The more correct interpretation would be that what followed was a violent struggle to deter arrest. It appears that both officers were assailed with verbal and physical abuse requiring one of them to telephone for help while the other struggled with petitioner and his wife (A. 153-154, 178-181). The ensuing melee ricocheted from room to room until the detective had seen virtually every room in the apartment and had observed vast quantities of furniture in all of them, including the bathroom (A. 179). Anything the officers saw was, thus, not even the result of a search since, at all times, the primary concern of the officers was to secure their prisoners. They engaged in no independent search of the premises. See *Warden* v. *Hayden*, 387 U. S. 294. This case has, in fact, all the elements of a "hot pursuit" case (See *Katz* v. *United States*, *supra* at 4083) and should be considered as such.

B

The procedure followed by the police was entirely reasonable within the meaning of the Fourteenth Amendment due process guarantee.

Petitioner's arrest and trial took place before the decision of this Court in *Mapp* v. *Ohio*, 367 U. S. 643. Although it is clear that the police procedures employed here cannot be faulted, even under the stricter standards by which petitioner would have them measured (Point II-A *supra*), and by which the District Court and Court of Appeals subsequently measured them, in fact, any assessment by way of habeas corpus of the validity of the introduction of allegedly tainted evidence must take into account the operative law at the time it was obtained and introduced.

Even assuming that *Mapp* would now require the police to obtain a warrant under the circumstances of this case, it is clear that there was no such requirement at the time of this pre-*Mapp* search; nor could the prosecutor have known that he risked reversal by introducing the evidence obtained without a warrant. *Linkletter* v. *Walker*, 381 U. S. 618, 637.

Beyond this, the police did not act unreasonably or abusively. Proceeding logically to petitioner's house on concrete information that he had, that morning, been at the scene of a specific crime, they were confronted simultaneously with petitioner and one of the stolen items. They arrested petitioner. Any force used was not to obtain entry, but to subdue persons who already had been told they were under arrest. These facts contrast sharply with the facts in *Mapp* itself as well as with those in *Linkletter* and its companion case, *Angelet* v. *Fay*, 381 U. S. 643. And, of course, this case is totally unlike the search and seizure case held to violate the Fourteenth Amendment in *Rochin* v. *California*, 342 U. S. 165. This case, in fact, is an example of swift, efficient and reasonable

police action. It is, thus, an inappropriate case for habeas corpus:

> "It is of the historical essence of habeas corpus that it lies to test proceedings so fundamentally lawless that imprisonment pursuant to them is not merely erroneous but void." *Fay* v. *Noia*, 372 U. S. 391, 423.

Habeas corpus is a means for assessing whether, under all the circumstances, a given state procedure rendered a conviction fundamentally unfair. *Stovall* v. *Denno*, 388 U. S. 293. This Court has already held that the introduction of even illegally obtained evidence does not destroy the integrity of the fact-finding process. *Linkletter* v. *Walker*, *supra*, at 639. Under the circumstances of this case, even if the exclusionary rule is deemed applicable, the arrest and seizure complied with standards of fundamental fairness irrespective of the applicability of strict Fourth Amendment standards.

It might be noted at this point that petitioner's claim in his brief (Point IV) that his rights under *Miranda* v. *Arizona*, 384 U. S. 436, were violated is not properly before this Court. That case is not retroactive to petitioner's trial (*Johnson* v. *New Jersey*, 384 U. S. 719), and the claim was not mentioned in the petition for certiorari. Rule 40(1)(d)(2), Revised Rules of the Supreme Court (1967).

C

Petitioner is not entitled, on federal habeas corpus, to the benefit of the exclusionary rule of *Mapp* v. *Ohio*.

The foregoing discussion (Point II, A, B) is premised on the assumption that petitioner would be entitled to the benefit of the exclusionary rule of *Mapp* v. *Ohio*, 367 U. S. 643, if he established that he was the victim of an unlawful or of a fundamentally unfair search and seizure. In fact, however, he should not be entitled to invoke the exclusionary rule because his trial was concluded before *Mapp* was decided.

Mapp v. *Ohio* was decided while petitioner's appeal from the judgment of conviction was pending in the Appellate Division, Second Department. He raised his claim in that Court, in the Court of Appeals and in his application to this Court for a writ of certiorari. *People* v. *Carafas*, 14 A. D. 2d 886, 218 N.Y.S. 2d 536 (2d Dept.), *aff'd.* 11 N. Y. 2d 891, 182 N. E. 2d 413, *remittitur amended* 11 N. Y. 2d 969, 183 N. E. 2d 697, *cert. denied sub nom. Carafas* v. *New York*, 372 U. S. 948. In so doing, he was invoking the principle that a case in the appellate process when a change in law occurs should be decided according to the new law. *United States* v. *Schooner Peggy*, 5 U. S. [1 Cranch] 102. Indeed, on this principle, this Court considered cases which were in the direct appellate process on the date *Mapp* was decided. *Ker* v. *California*, 374 U. S. 23; *Fahy* v. *Connecticut*, 375 U. S. 85; *Stoner* v. *California*, 376 U. S. 483.

When certiorari was denied in the instant case, it passed out of the direct appellate process. *Linkletter* v. *Walker*, *supra* at 622 n. 5. Both *Linkletter* v. *Walker*, *supra* and *Tehan* v. *Shott*, 382 U. S. 406, were habeas corpus cases in which the convictions had become final prior to the decisions in *Mapp* v. *Ohio*, *supra* and *Griffin* v. *California*, 380 U. S. 609. They did not deal with the availability of habeas corpus to persons who had been in the direct appellate process on the date of those decisions. As this Court held in *Johnson* v. *New Jersey*, 384 U. S. 719, 732:

> "Our holdings in *Linkletter* and *Tehan* were necessarily limited to events which had become final by the time *Mapp* and *Griffin* were rendered. Decisions prior to *Linkletter* and *Tehan* had already established without discussion that *Mapp* and *Griffin* applied to cases still on direct appeal at the time they were announced. See 381 U. S., at 622 and n. 4; 382 U. S., at 409, n. 3."

However, it is submitted, the holdings in *Ker*, *Fahy* and *Stoner*, applying *Mapp* to cases on direct appeal when that

case was decided should apply only on direct appeal.* The distinction between habeas corpus and direct review is not illusory or irrational. The petitioner, who is no longer in the appellate process, should be entitled to no broader consideration on collateral attack than the petitioner who completed the appellate process before *Mapp* was decided. The scope of habeas corpus should not vary according to when the direct appellate process comes to an end.

Thus, in *Johnson* v. *New Jersey, supra,* this Court held that the rules announced in *Miranda* v. *Arizona, supra* and *Escobedo* v. *Illinois,* 378 U. S. 478, would not apply to cases which had passed the *trial* stage by the dates of those decisions. There is no inherent reason why search and seizure cases, on collateral attack, should be more broadly retroactive then cases involving statements taken absent counsel and introduced in evidence or than pre-trial identifications. See *Stovall* v. *Denno, supra.*

POINT III

Petitioner was not wrongfully denied a full appeal by the Court of Appeals.

Petitioner claims that he was improperly denied a full appeal by the Court of Appeals after the District Court had granted a certificate of probable cause pursuant to 28 U.S.C. § 2253. Although he makes this claim without reference to the case of *Nowakowski* v. *Maroney,* 386 U. S. 542, it is clear that this is the most relevant case in the field. In *Nowakowski,* this Court held that once the District Court had granted a certificate of probable cause, "the court of appeals must grant an appeal *in forma pauperis* (assuming the requisite showing of poverty), and proceed

* Under this analysis, it does not matter whether or not petitioner objected to the introduction of the evidence, although he did not. The Second Circuit, however, should not have held, on the original remand (A. 44-48), that habeas corpus reached this case on the basis of *Ker, Fahy* and *Stoner.*

to a disposition of the appeal in accord with its ordinary procedure." 386 U. S. at 543. It is not clear from the decision in *Nowakowski* whether or not, in denying leave to proceed *in forma pauperis,* the Court of Appeals in that case considered anything other than petitioner's application.

The procedure followed by the Court of Appeals for the Second Circuit in this case, as in all other such cases, is distinguishable from the denial of *forma pauperis* relief in *Nowakowski.* In the instant case, after petitioner's application for leave to appeal *in forma pauperis,* respondent formally opposed the granting of such relief, but, more significantly, also cross-moved to dismiss the appeal on the ground that it was without merit (A. 59-64).* In determining the motion to dismiss, the Court of Appeals had before it the entire District Court record including the trial transcript, the minutes of the evidentiary hearing, the minutes of the 1962 suppression hearing and the memoranda of law filed by counsel for both sides in the District Court after the hearing. From this record, the Court of Appeals determined that a full appeal with further briefs and oral argument was unnecessary. Dismissal of an appeal under these circumstances violates no statutory or constitutional rights of a habeas corpus appellant. It is merely a procedure for disposing of frivolous appeals without a plenary hearing but only after a full consideration of the record.

A person who secures a certificate of probable cause from the District Court should be in no better position than one who has an appeal as of right and who is subject to a motion to dismiss that appeal in a higher court if that

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* Although respondent's papers were denominated in part as being in opposition to leave to appeal *in forma pauperis,* clearly the sole object was dismissal of the appeal. There is no indication in this case or in the past practice of the Second Circuit that had the motion to dismiss been denied, leave to proceed *in forma pauperis* would also have been denied. In fact the normal practice is to grant *forma pauperis* relief in such cases.

court should determine that the appeal does not justify plenary review. See, e.g., *United States* v. *Peltz*, 246 F. 2d 537, 538 (2d Cir.). *Cf. Coppedge* v. *United States*, 369 U. S. 438, 448. Indeed, it is common practice for this Court summarily to dispose of cases in which there is an appeal as of right by granting motions to dismiss or affirm. Rule 16, Revised Rules of the Supreme Court (1967).

Moreover, in his motion to the Court of Appeals, petitioner did not request that counsel be assigned and, indeed, he was represented by retained counsel in the District Court as he was on the petition for re-hearing in the Court of Appeals and as he is in this Court. Petitioner thus was not denied counsel (See *Douglas* v. *California*, 372 U. S. 353) and the case was not dismissed because petitioner was indigent.* The question was solely one of merit.

It is obvious from the facts as set forth in Point II, *supra*, and as contained in respondent's moving papers in the Court of Appeals (A. 59-64) that the appeal was wholly lacking in merit. In the Court of Appeals the ground upon which petitioner sought to appeal was that his version of the facts was correct, a theory which the District Court, as finder of fact and judge of credibility, had wholly rejected (A. 49-56). The District Court's findings of fact were supported by the record and could be set aside only if clearly erroneous. F. R. Civ. Proc. 52(a). In view of the evidence, any claim that the decision of the District Court was erroneous is frivolous.

Although we believe that *Nowakowski* should not be interpreted as prohibiting a Court of Appeals from granting a motion to dismiss a habeas corpus appeal as being without merit, it must be noted that it appears to be the policy of the Court of Appeals for the Second Circuit that in cases

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* Once the Court granted the motion to dismiss the appeal, the application to proceed *in forma pauperis* was moot. There is no indication that the allegations of poverty were sufficient in any event.

where habeas corpus appeals have been dismissed, reargument will be granted and the appeal reinstated where the time to apply for certiorari had not expired prior to the decision in *Nowakowski*. *United States ex rel. John J. Schaedel,* Second Circuit Docket No. 31189, app. dism. March 14, 1967, reinstated November 13, 1967. If such a procedure is considered to be required by the Court's decision in *Nowakowski,* we submit that the standard apparently adopted by the Second Circuit of only reinstating appeals which were not final when *Nowakowski* was decided would represent an appropriate cut off date.

CONCLUSION

For the foregoing reasons, the order of the Court of Appeals should in all respects be affirmed.

Dated: New York, New York, December 27, 1967.

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